Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

October Term, 1997

ALLIED MINORITY CONTRACTORS ASSOCIATION, INC., South Florida Chapter of NAMC,

Petitioner,

v

ENGINEERING CONTRACTORS ASSOCIATION OF SOUTH FLORIDA, INC., ASSOCIATED GENERAL CONTRACTORS OF AMERICA, South Florida Chapter, Inc., GOLD COAST ASSOCIATED BUILDERS AND CONTRACTORS, INC., CONSTRUCTION ASSOCIATION OF FLORIDA, INC., UNDERGROUND CONTRACTORS ASSOCIATION OF SOUTH FLORIDA, INC., and AIR CONDITIONING AND REFRIGERATION ASSOCIATION, INC.,

Respondents.

On Petition For Writ of Certiorari To The Court Of Appeals For The Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do the respondent associations have standing to challenge the constitutionality of all of the severable "contract measures" of a race or gender conscious affirmative action program where there is only evidence that one out of the five "contract measures" have any concrete effect on the respondents?

LIST OF PARTIES

The caption of the case contains the names of the parties involved with the exception of the Black Business Association, Inc., Metropolitan Dade County, Joaquin Avino, County Manager of Metropolitan Dade County, Betty Ferguson, James Burke, Arthur E. Teele, Jr., Sherman S. Winn, Bruce Kaplan, Pedro Reboredo, Maurice Ferre, Larry Hawkins, Dennis Moss, Javier Souto, Miguel Diaz de la Portilla, Alexander Penalas, Natacha Millan, individually, and in their official capacities as members of the Board of County Commissioners, and the National Association for the Advancement of Colored People, Miami Dade Branch.

RECORD REFERENCE

All record reference shall be indicated by the letters "App." followed by the pagination given to said record in the Appendix attached to the Petition for Writ of Certiorari filed by Metropolitan Dade County.

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CITATIONS AND REPORTS OF OPINIONS ENTERED BELOW

The findings of fact and conclusions of law and final judgment entered by the district court below comprise pages App. 79-165 and 169-171 of the Appendix (hereinafter "App.") hereto, and are reported at *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546 (S. D. Fla. 1996). The opinion entered by the Eleventh Circuit below comprises pages App. 1-78 of the Appendix hereto and is reported at *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F. 3d 895 (11th Cir. 1997). The mandate of the Eleventh Circuit and its denial of the petition for rehearing comprise pages App. 166-168 and 172-173.

STATEMENT OF THE BASIS FOR JURISDICTION

The decision sought to be reviewed is a decision of the United States Court of Appeals for the Eleventh Circuit

entered on September 2, 1997. App. 2. Rehearing was denied on October 8, 1997. App. 173.

28 U.S.C. §1254 provides that this Court may review cases in the courts of appeals by writ of certiorari upon petition of any party.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Constitutional provision involved in this case is Section 1 of the Fourteenth Amendment to the United States Constitution which reads in pertinent part as follows: "nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Metropolitan Dade County n/k/a Miami Dade County enacted three affirmative action programs which have been challenged on constitutional grounds by the respondents in this case: (1) the Black Business Enterprise ("BBE") Program; (2) the Hispanic Business Program ("HBE"); (3) the Women Business Enterprise ("WBE") Program. App. 3. These ordinances are three separate and distinct ordinances.

Each ordinance contains five separate and distinct contract measures and each ordinance contains a severability clause. Each contract measure is separate, distinct and severable from the others.

All of these programs apply to certain classes of County contracts for which "participation goals" have been set: 15% for BBEs; 19% for HBEs, and 11% for WBEs. The County is required to make every reasonable effort to achieve the participation goals, and, as to either the BBE, WBE or HBE Program, may use any of the following five "contract measures"(all of which are separately referred to in each of the three ordinances) to do so: (1) Set Asides--Under this measure a contract is set aside for bidding solely among BBEs, HBEs or WBEs; (2) Subcontractor Goals--This measure requires a prime contractor to sublet a certain percentage of the work to a BBE, HBE or WBE; (3) Project Goals--With this measure, the County creates a pool of BBE, HBE or WBE subcontractors from which it selects firms for specified types of work; (4) Bid Preference--This measure artificially reduces a BBE, HBE or WBE bid price by as much as 10% for the purpose of determining the

lowest bid; (5) Selection Factors--This measure is similar to a bid preference, but operates on factors other than price. A review committee determines whether a contract measure of any of the three minority programs should be applied once a contract is identified as being covered by participation goals. App. 4-6. The respondents' complaint only alleges that respondents were injured by the contract measures entitled "set-aside" and "subcontractor goals". The respondents didn't challenge the contract measures entitled "bid preference", "project goals" and "selection factor". Although the respondents alleged that they were harmed by the subcontractor goals of the BBE and WBE programs, they failed to prove that they have been injured by this contract measure of either the BBE or WBE ordinance as it applies to subcontractors.

A bench trial on the merits was concluded. A final judgment, findings of fact and conclusion of law were entered by the trial court on September 17, 1996. A timely appeal was filed and an opinion was rendered by the Eleventh Circuit Court of Appeal on September 2, 1997. A

motion for rehearing was timely filed by Metropolitan Dade County, which was denied on October 8, 1997.

The opinion of the Court of Appeal for the Eleventh Circuit found that the parties had stipulated that it was likely that the members of the respondent associations would be excluded in the future from bidding on certain contracts--based on racial, ethnic and sexual criteria set forth in the three programs. The petitioner/defendant in the case below, challenged the respondents/plaintiffs' failure to establish--by stipulation or evidence--which of the five "contract measures" likely will adversely affect them, and, thus, that the respondents lacked standing to challenge the BBE and WBE programs *in toto*. The Eleventh Circuit disagreed and held that if a respondent has standing to challenge one "contract measure" of a particular minority ordinance, the respondent has standing to challenge all "contract measures" contained in that ordinance.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit opinion is in direct conflict with the opinion of the Eighth Circuit in the case of *United*

States v. Lemons, 697 F.2d 832 (8th Cir. 1983) and the United States Supreme Court in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979).

The decisions in *Lemons* and *Beazer* addressed constitutional challenges to a state statute and a city transit authority regulation, respectively. In each case, the petitioner challenged the statute or regulation in toto, notwithstanding the limited standing of each of the petitioners, and contrary to this court's separability doctrine. In *Beazer*, this court stated that:

> "... neither the findings of fact, nor the record evidence, squarely presents any issue with respect to former users that must be resolved in order to dispose of this litigation. * * * A policy excluding all former users would be harder to justify than a policy applicable only to persons currently receiving treatment. A court should not reach out to express an opinion on the constitutionality of such a policy unless necessary to adjudicate a concrete dispute between adverse litigants. We shall therefore confine our consideration to the legality of TA's enforcement of its Rule 11(b) against <u>current</u> users of methadone."
>
> *Id.* at 572 n. 3, 99 S.Ct. at 1359 (emphasis original).

Thus, even when there is a facial attack on the statute or regulation, prudential reasons require an "applied" approach which limits consideration to only those issues directly affecting the petitioner. *Lemons* at 837; *Cf. Mancuso v. Taft*, 476 F.2d 187, 191-192 (1st Cir. 1973) (stating that once there is standing in the constitutional sense, a facial equal protection challenge might always be proper). The *dicta* of the *Mancuso* case, while apparently followed by the Eleventh Circuit in the instant case, is also in direct conflict with *Lemons* and *Beazer*.

In the case before this court, the respondents had standing to challenge the "set aside" contract measure of all three ordinances and it had, as general contractors, standing to challenge a portion of the subcontractor goals pertaining to general contractors. However, the respondents did not have standing to challenge that portion of the subcontracting goals of the BBE and WBE programs that pertain to subcontractors. Notwithstanding the lack of an injury in fact caused by the subcontractor goals, the trial court conferred standing on the respondents to challenge the BBE and WBE ordinances *in toto*.

On appeal to the Court of Appeals for the Eleventh Circuit, the appellate court affirmed the trial court's ruling on the issue of standing and held that, in an Equal Protection Clause challenge, where only a part of an ordinance causes an injury in fact, the injured party has standing to challenge all portions of the ordinance that do not cause the petitioner any injury. The court did not dispute the petitioner's contention that the ordinances and contract measures were severable.

As to the "subcontractor goals", Allied concedes that the respondents have proven standing to challenge the severable subsection of the "subcontractor goals" that authorizes the applicable minority general contractor[1] to use fifty percent of its own forces to fulfill the "subcontractor goals". Allied also concedes that the respondents have proven standing to challenge the Hispanic ordinance as it applies to all portions of the "subcontractor goals". This concession is based on the trial testimony that showed that at least one of the respondents competes against Hispanic subcontractors.

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[1]The term "general contractor" shall refer to the contractor who submits bids to Dade County. The term "subcontractor" shall refer to those contractors who submit bids to the general contractors.

However, notwithstanding the respondents' standing to challenge the "set-aside" contract measure of all three ordinances and their standing to challenge the Hispanic "subcontractor goals", the respondents failed to prove that any of their members sustained an "injury in fact" as a result of the competitive disadvantage created by the Black and Women "subcontractor goals". All that the respondents have established, as to the BBE and WBE programs, is that the "subcontractor goals" contained in these programs creates a competitive disadvantage to non-Black and non-Women subcontractors. They have not shown an individualized harm because they did not establish that they compete with Black and Women subcontractors for work that is subject to these "subcontractor goals".

The Supreme Court in *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982) has held that:

> "It is not enough that the conduct of which the plaintiff complains will injure someone. The complaining party must show that he is within the class of persons who will be concretely effected. Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."

More importantly, just because one severable portion of the Black or Women ordinance (the portion that authorizes general

contractors to use 50% of their forces to meet the goals) concretely effects the respondents, the respondents do not have standing to challenge the remainder of the ordinance that is severable. *See, United States v. Lemons*, 697 F.2d 832 (8th Cir. 1983) and *New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979). The separability doctrine was followed in *Pederson v. Louisiana State University*, 912 F.Supp. 892 (M.D. La. 1996). In *Pederson*, a class action was filed against Louisiana State University challenging the University's athletic program which allegedly treated women athletes differently from the male athletes. The court found that the class of women challenging the program did not have standing to challenge those portions of the athletic program which did subject some women to unequal treatment but which did not subject any of the plaintiffs' class of women to unequal treatment, i.e., the plaintiffs were not competing for an opportunity to use this particular portion of the athletic program reserved for male athletes.

Standing is perhaps the most important of [the jurisdictional] doctrines. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31, 110 S.Ct. 596, 607-08, 107 L.Ed.2d 603 (1990) (citations omitted). The question of standing is not subject to

waiver and the appellate court is "required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue..." before the appellate court. *United States v. Hayes*, ___ U.S. ___, 115 S.Ct. 2431, 2435 (1995).

Before reaching the merits on any constitutional challenge which seeks to enjoin the enforcement of an ordinance, the court must first consider whether the plaintiff has standing to seek forward looking relief. *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). The doctrine of standing has emerged from the restriction in Article III of the Constitution which limits the jurisdiction of the federal courts to "cases" or "controversies".

> "It has long been established by a long line of cases that a party seeking to invoke a federal court's jurisdiction must demonstrate three things: (1) 'injury in fact,' by which we mean an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,' *Lujan, Supra*, 504 U.S., at __, 112 S.Ct., at 2136 (citations, footnote, and internal quotation marks omitted); (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury 'fairly can be traced to the challenged action of the defendant,' and has not resulted 'from the independent action of some third party not before the court,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976); and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the 'prospect of obtaining relief from the injury as a

> result of a favorable ruling' is not 'too speculative,' *Allen v. Wright, Supra*, 468 U.S., at 752, 104 S.Ct., at 3325. These elements are the 'irreducible minimum,' *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982), required by the Constitution." *Northeastern Fla. Chapter of Assoc'd Gen. Contractors of Am. v. City of Jacksonville*, ___ U.S. ___, ___ 113 S.Ct. 2297, 2301-02, 124 L.Ed.2d 586, ___ (1993).

The party invoking Federal jurisdiction has the burden of proving all of these elements since they are not mere pleading requirements but indispensable parts of a plaintiff's case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). At the pleading stage of the proceedings, the plaintiff may make general factual allegations necessary to support the plaintiff's claim. However, at the trial stage, "... those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.' *Gladstone, Supra*, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992).

In order for the respondents to have standing to enjoin the enforcement of any particular part of the Black and Women's ordinances, they must allege and prove that Dade County will let a contract, in the future, that is affected by a particular "contract

measure", that one of the respondents is ready and willing to bid on this contract, that the respondents must compete for such contracts against Black and Women owned contractors and that the challenged "contract measure" prevents the respondents from bidding, on an equal basis, with Black and Women owned firms. *See, Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097 (1995). *See also Northeastern Fla. Chapter of Assoc'd Gen. Contractors of Am. v. City of Jacksonville*, ___ U.S. ___, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 119 L.Ed.2d 351 (1992).

COMPETITION IS AN ESSENTIAL INGREDIENT

The court, in *Adarand*, addressed the constitutionality of a Federal law that required that most federal agency contracts must contain a subcontractor compensation clause. This clause gives an incentive to general contractors who hire "socially and economically disadvantaged individuals" and creates a presumption that all Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans are socially and economically disadvantaged. This law only contained one "contract measure" and concerns all minorities.

The court found that Adarand had standing "[b]ecause the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses...." [Emphasis added] *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2105 (1995).

The court in *Adarand* made a point of including, within the criteria necessary to prove standing, that Adarand must compete for such contracts against small disadvantaged businesses.[2] Here, there are three separate and distinct ordinances for three separate and distinct minorities. Therefore, the *Adarand* rule must be applied separately to each of these three ordinances. The question then, as to the Black and Women's ordinance is whether the respondents have proved that they compete against Black and Women subcontractors and whether the ordinance creates an uneven playing field, i.e., creates a competition disadvantage. The respondents failed to

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[2]Like Northeastern, Adarand involved one contract measure, the subcontractor compensation clause, which benefited all minorities as a group of "disadvantaged" subcontractors.

meet this burden of proof. While it was admitted in the joint pretrial stipulation that the Black and Women ordinances created a disadvantage for respondents subcontractors, there was no evidence, by stipulation or otherwise, that the respondents' members competed against Black or Women subcontractors, i.e., that they were playing on the same field as Black and Women subcontractors.

The respondents only presented evidence that the respondents competed against Hispanic subcontractors. This point is significant because the Supreme Court in *Lujan, Supra*, at 565, n.2, 112 S.Ct., at 2138, stated that "[a]lthough 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to insure that the alleged injury is not too speculative for Article III purposes - that the injury is 'certainly impending'." Furthermore, the court, in *Lujan*, emphasized that the invasion of a protected interest must be "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan, Supra*, at 560, 112 S.Ct., at 2136. Therefore, in accordance with *Adarand*, it is incumbent on the respondents to prove that the "subcontractor goals" of the Black and Women Programs, created an uneven playing field on which the respondents were playing.

Unlike *Adarand*, there was no stipulation or testimony that Dade County is likely to let contracts involving work that contain any specific Black or Women "contract measure" in the immediate future or even once per year or that they will utilize the Black or Women's programs. Even if there was an inference that such a contract would be let, there was no evidence that any of the respondents in the instant case were in competition with certified Black and Women owned subcontractors and were ready and willing to bid on a contract which contained any of the Black and/or Women contract measures, other than "set-aside".

Competition is the key to determining whether there has been an "injury in fact". In the seminal case of *Northeastern Fla. Chapter of Assoc'd Gen. Contractors of Am. v. City of Jacksonville*, ___ U.S. ___, ___ 113 S.Ct. 2297, 2301-02, 124 L.Ed.2d 586, ___ (1993), the Supreme Court did not eliminate the burden on the respondents to prove that they compete for contracts which are affected by the Black and Women "subcontractor goals". *Northeastern* involved only one contract measure-- "set-aside"--and only one ordinance for all minority businesses. The petitioners, in *Northeastern*, alleged that they bid on contracts let by the City of Jacksonville and that they would have bid on those contracts that had been set aside solely

for minority contractors. In that case, there was only one minority pool with which to compete which did not distinguish between Black, Hispanic or Women contractors. They all competed for prime contracts as minorities and one ordinance created an uneven playing field for that competition. Therefore, in *Northeastern*, by being willing and able to bid against any minority contractor, the petitioners proved that they were competing, i.e., they were players, on an uneven playing field.

Northeastern is similar to *Adarand* in that both cases involve a single program for all minorities. The only significant difference was that *Northeastern* involved general contractors and a "set-aside" contract measure, whereas *Adarand* involved subcontractors and a subcontractor contract measure. In both cases, this court required a showing of individualized harm in the form of competition with minority contractors.

The present case is distinguishable from *Northeastern* and *Adarand*. In the instant case, there are three separate and distinct ordinances--one for Hispanics, one for Blacks and one for Women. The respondents must meet the *Adarand* standards separately for each ordinance in order to have standing.

CONCLUSION

The trial court lacked federal jurisdiction to enjoin the enforcement of those portions of the Black Business Enterprise ordinance and the Women Business Enterprise ordinance that were either not challenged or for which there was no proof that the respondents had standing. The only portions of the Black and Women ordinances that were challenged were two, out of the five contract measures contained in each ordinance--"set-asides" and "subcontractor goals". The only part of the ordinances to which the respondents proved that they had standing to challenge were "set-aside" and a subsection of the "subcontractor goals" that gave minority general contractors the advantage of using their own forces to meet 50% of the "subcontractor goals". Therefore, the final judgment should be reversed as it applies to all aspects of the Black and Women's affirmative action ordinances, other than the contract measure entitled "set-aside" and that subsection of the "subcontractor goals" that give an advantage to Black and Women general contractors using their own forces to meet "subcontractor goals".

For the reasons stated and upon the authorities cited, the Petition for Certiorari should be granted.

Respectfully submitted,

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